COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

Supreme Judicial Court:
No.:_____

Appeals Court No.:
No.: 2020-P-0826

COMMONWEALTH

v.

RONNIE M. HARRIS

APPLICATION FOR FURTHER APPELLATE REVIEW

Now comes the elderly defendant and applies for further appellate review of the denial of his motion to stay execution of his sentence pursuant to Mass. R. A. P. 6 by the Appeals Court Single Justice (2020-J-0189), which was affirmed by the Appeals Court on August 28, 2020 in a Memorandum and Order pursuant to Mass. R. A. P. 23.0 decision (2020-P-0826) at 98 Mass. App. Ct. 1110 for the reasons set forth in the attached memorandum.

RONNIE M. HARRIS
By his attorney

/s/ Inna Landsman

_____
BBO 640142
451 King St. #1342
Littleton, MA 01460
617-620-9434
Ilandsman@me.com
September 19, 2020

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

Supreme Judicial Court:
No.:_____

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COMMONWEALTH

v.

RONNIE M. HARRIS

MEMORANDUM IN SUPPORT OF APPLICATION FOR FURTHER APPELLATE REVIEW

INTRODUCTION

We are all be sick and tired of the global COVID-19 pandemic. Unfortunately, according to the pre-eminent U.S. infectious disease expert, life is not likely to return to normal until the end of 2021, when we will *hopefully* have a widely available and effective vaccine. https://www.nbcnews.com/health/health-news/fauci-says-us-won-t-get-back-normal-until-late-n1239882 (last visited September 18, 2020). Until then, COVID-19 will continue to be a grave danger to both elderly prisoners and those with certain medical conditions. *CPCS v. Chief Justice* (hereinafter "CPCS No. 1"), 484 Mass. 431,

449 (2020). Further, prison outbreaks endanger all of us because prison workers can and do unwittingly spread the virus between their workplaces and their families and communities. https://www.aclu.org/sites/default/files/field_document/aclu_covid19-jail-report_2020-8_1.pdf (last visited September 11, 2020).

Because it is nearly impossible to physically isolate in prison, this Court has changed the standards for release of prisoners under certain conditions, in favor of those who are at high risk and who are not a danger to public safety. For example, in the context of motions to stay execution of sentence pending appeal, this Court has added a third prong to the inquiry requiring consideration of the prisoner's specific risk of bad outcomes from COVID-19 infection. *Christie v. Commonwealth*, 484 Mass. 397, 401-402 (2020). However, the Appeals Court appears to have raised defendants' burden of persuasion on these motions. For example, in this case it affirmed the denial of Harris' Mass. R. A. P. 6 motion even though the Commonwealth conceded that there was a constitutional error in his trial jury charge (prong 1), the Court determined that he is not a flight risk nor danger to others if released (prong 2), and it determined that he is at significant danger from COVID-19 infection because of his

elderly age and underlying conditions (prong 3). The two specific issues requiring this Court's guidance are:

(1) what is required to prevail on prong 1 of *Christie, supra;* and

(2) how should the three *Christie* prongs be weighed, particularly for an at-risk elderly prisoner whose release would not endanger public safety and where the Appeals Court doubts that the DOC can keep him safe from COVID-19 infection while he's in custody.

STATEMENT OF PRIOR PROCEEDINGS[1]

Mr. Harris[2] was convicted, in March 1975, of second-degree murder (Suffolk Superior No. 7484CR82302) for a drug-related killing, and sentenced to life. *See Commonwealth v. Harris*, 376 Mass. 201 (1978).[3] On August 1, 2019, he filed his first Mass. R. Crim. P. 30(b) motion (A/12-13, A/79 et seq.) which was denied on March 24,

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[1] Reference to the unimpounded record appendix and impounded appendix filed with the Mass. R. A. P. 6 motion (Appeals Court no. 2020-J-0189) shall be made as "A/[page#]" and "IE/[page#]", respectively, and to the relevant transcript pages reproduced in the record appendix as "T[volume number]/[page]".

[2] As set out in the decision, he changed his last name after the conviction. Reference is made herein to his former surname.

[3] He was also convicted of assault with intent to murder and possession of a firearm out of the same incident. However, these two convictions had different docket numbers.

2020 (A/13, A/182) but not docketed until April 10, 2020 due to COVID-19-related clerk staffing shortages (A/13). Not having notice, he filed an emergency motion to vacate or stay his sentence on April 2, 2020 (A/191), which was denied that day (A/207). On April 27, 2020, he filed a Mass. R. A. P. 6 motion (docket 2020-J-0189) which was denied on April 30, 2020. A Notice of Appeal was filed on July 22, 2020 together with a motion to accept the late-filed Notice of Appeal, which was allowed on July 24, 2020. The appeal entered that same day (2020-P-0826). In response to the Court's July 31, 2020 order, the Commonwealth filed a response to the Mass. R. A. P. 6 motion on August 10, 2020, and the defendant filed two brief supplements on August 12th and 21st, 2020. The Court's Memorandum and Order pursuant to Mass. R. A. P. 23.0 (hereinafter "Op.", attached hereto) issued on August 28, 2020. Neither party has filed a motion for rehearing.

STATEMENT OF FACTS

The appellant relies on the facts in the Appeals Court's opinion with the following additions. As set out in the report of the expert forensic psychologist submitted with the Mass. R. A. P. 6 motion, Harris was paroled in 1989 and remained on parole for 29

continuous years while maintaining consistent employment with the Boston Water and Sewer Commission and never failing a drug test. (IE/3 & 15) In 2018, he was returned to custody (IE/3) and, in 2019, convicted of an offense said to have occurred in the late 1990s, for which he was sentenced to 2 years in the House of Correction.[4] (IE/ 14-15). On August 21, 2020, he filed a supplement to that report indicating that the forensic psychologist determined that he has a "very low" risk of recidivism. *Accord* IE/16-17. The 65 year-old Harris also submitted medical records showing that he suffers from multiple conditions increasing his susceptibility to serious illness or death from COVID-19 infection, including respiratory illness, namely asthma, poorly-controlled hypertension, diabetes, suspected renal cell carcinoma ("RCC"), and stage 3 chronic kidney disease (IE/18-25), and on August 12, 2020 he filed proof that there were active COVID-19 cases at MCI-Norfolk where he is imprisoned (*accord* A/210). Further, upon release he will live with his sister in a three bedroom, three bathroom house that she owns and in which she lives alone where he would be able to physically isolate. (IE/12, A/ 203 & August 12, 2020 filing).

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[4] He has completed serving this 2 year sentence, and is now held only on his life sentence.

POINTS WITH RESPECT TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

I. The Appeals Court erred in affirming the Single Justice's denial of Harris' Mass. R. A. P. 6 motion seeking stay of execution of sentence pending appeal under the three prongs of *Christie v. Commonwealth*, 484 Mass. 397 (2020). Specifically:

(a) PRONG 1*: T*he Commonwealth conceded that Harris' jury charge included constitutional error that shifted to him the burden of proof on the malice element of murder, see *Sandstorm v. Montana*, 442 U.S. 510 (1979), and it erroneously determined that other constitutional errors were precluded by G. L. c. 278, *§*33E review, see Op. at 5-6. It was error to conclude that Harris did not prevail on this prong.

(b) PRONG 2: The Appeals Court determined that he prevailed because it did not believe that he would present a risk of flight nor a danger to others nor a risk of re-offense if released, *id.* at 4, 6-7.

(c) PRONG 3: The Appeals Court determined that Harris prevailed because he is at heightened risk of serious illness or death from COVID-19 because of his advanced age and many health conditions. *Id.* at 6-7. It further found that the "Commonwealth has

not been successful at keeping MCI-Norfolk [where he is imprisoned] free of COVID-19, nor is there any guarantee that it will be able to do so in the future". *Id.* at 6-7.

II. Given the community health interest in decarceration of prisoners who do not pose a threat to public safety, should a prisoner be entitled to a stay of sentence pending appeal if he prevails on the second and third prongs of *Christie, supra?*

BRIEF STATEMENT WHY FURTHER APPELLATE REVIEW IS APPROPRIATE[5]

Prison safety is necessarily community safety because prison workers are exposed to COVID-19 in prisons and then cycle back to the wider community where they infect their families and the wider community. *See Foster v. Commissioner of Correction,* 484 Mass. 698, 734 (2020) (Gants, C.J., concurring) (DOC Commissioner, the World Health Organization and even the DOJ all agree that prison populations should be reduced to contain COVID-19 spread); https://www.aclu.org/sites/default/files/field_document/aclu_covid19-jail-report_2020-8_1.pdf (last visited September 11, 2020, prisons spread

[5] The SJC has discretion to take, upon further appellate review, such cases and grant stays. *Polk v. Commonwealth*, 461 Mass. 251, 254 (2012) *citing* G. L. c. 211A, § 11.

infections to the community); https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.00652 (last visited September 18, 2020, cycling of people through the Cook County Jail is associated with almost 16% of all documented COVID-19 cases in Illinois). This Court also recognized that prisons face unique challenges in preventing COVID-19 spread because it's nearly impossible to socially distance in prisons and there are sanitation problems, and COVID-19 poses a particular risk to elderly prisoners and those with underlying conditions who are both at much higher risk of serious illness or death from COVID-19. *CPCS No. 1,* 484 Mass. at 436-437. Under these exceptional circumstances, this Court has encouraged decarceration of prisoners who are not a public danger. *CPCS v. Chief Justice of the Trial Court* (hereinafter "CPCS No. 2"), 484 Mass. 1029, 1030 (2020); *Christie, supra.*

A stay of sentence pending appeal is rooted in the notion that the unavoidable delays of the appellate process "may work an irremediable unjust loss of liberty in case [the defendant's] conviction is finally overthrown." *Williams, petitioner*, 378 Mass. 623, 626 (1979). That potential injustice is all the more pressing during this pandemic as "an untimely death is even less reversible than time spent in prison." *CPCS No. 2,* 484 Mass. at 1031 n.4. Because of the dire

health threat of COVID-19, this Court modified the required analysis for a stay by both requiring *de* novo analysis on review and adding a third prong to the analysis - - namely careful assessment of the defendant's particular risk of death and serious illness were he to remain in custody. *Christie,* 484 Mass. at 398, 401-2.

However, a review of Appeals Court docket number 2020-J-0190 through 2020-J-390 shows that a total of 21 Mass. R. A. P. 6 motions were decided from 4/30/20 through 9/9/20 - - without a single allowance - - for prisoners convicted in Superior Court[6]. Nor could the undersigned find a single successful appeal therefrom. Here, Harris provided overwhelming evidence on *Christie* prongs 2 and 3, but the Appeals Court affirmed the denial by holding him to a higher standard on prong 1 than what has been required by almost half a century of SJC precedent. Thus, this Court's input is required on the correct test for prong 1 under *Christie*.

Harris should have prevailed on *Christie* prong 1 both because the Commonwealth admitted that there was constitutional error in his jury charge and also because the Appeals Court wrongly determined

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[6] Namely 2020-J-0190, 2020-J-0193, 2020-J-0196, 2020-J-0197, 2020-J-0203, 2020-J-0206, 2020-J-0209, 2020-J-0216, 2020-J-0225, 2020-J-0232, 2020-J-0233, 2020-J-0236, 2020-J-0237, 2020-J-0241, 2020-J-0264, 2020-J-0270, 2020-J-0283, 2020-J-0301, 2020-J-0330, 2020-J-0343.

that the other issues were precluded under G. L. c. 278, §33E when they were not. For close to half a century, this Court has required nothing more than a colorable claim to prevail on prong 1. *Christie, supra* at 400 citing *Commonwealth* v. *Allen*, 378 Mass. 489, 498 (1979) (required "an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal"); *Commonwealth v. Charles*, 466 Mass. 63, 78 (2013) ("a colorable claim" without consideration of the ultimate merits); *accord Lovell* v. *Lovell,* 276 Mass. 10, 11-12 (1931) (a "meritorious claim" meaning "one which is worthy of judicial inquiry ... raising a question of law deserving some investigation and discussion"); *Russell* v. *Foley,* 278 Mass. 145, 148 (1932) ("one that is worthy of presentation to a court, not one which is sure of success"). Harris more than met this low bar. Specific issues to be litigated on appeal of his new trial motion denial are:

Error 1: The reasonable doubt instruction unconstitutionally lowered the Commonwealth's burden of proof by repeatedly defining it with language whose meaning has changed since it was first used in W*ebster*[7]*,* namely "moral certainty", without the required context that would have relayed to the jury the subjective state of near certitude of

[7] 5 Cush. 295 (1850).

guilt required to convict. *See* 14th Amendment to the U.S. Constitution, art. 12 of the Massachusetts Declaration of Rights; *Victor v. Nebraska,* 511 U.S. 1 (1994)*; Commonwealth v. Pinckney,* 419 Mass. 341, 342, 344, 348-9 (1995)[8] (vacating 1973 murder conviction on collateral review for virtually identical errors as here where the charge used "moral certainty" language outside the context of the *Webster* charge). Harris' charge used this language improperly at least 8 times without the required contextualizing language. (TV/ 1011-13 & 15; A/37-39, 41). This is structural error. *Pinckney, supra* at 342. The Appeals Court was incorrect that this issue was precluded under G. L. c. 278, *§*33E review (Op. at 5-6) because:

(1) Harris' *§*33E review predated *Pinckney* by almost 20 years. There was no "genuine opportunity" to raise a Pinckney moral certainty claim until after *Cage v. Louisiana*, 508 U.S. 275, 281-282 (1990). *Mains v. Commonwealth,* 433 Mass. 30, 31, 33-34, n.4 (2000) (defendant convicted of murder in 1974, who had *§*33E review, did not waive this issue by not including it in his first three motions for new trial all filed prior to 1990). To be clear: this argument was not available in 1978, the year of Harris' *§*33E review. *See id.* at 34 n. 4.

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[8] Just as it was applied by *Pinckney*, it is also retroactive pursuant to *Commonwealth v. Sylvain*, 466 Mass. 422, 435 (2013) as discussed at A/101-2.

(2) The *Pinckney* defendant himself had §33E review in 1973, *see Commonwealth v. A Juvenile,* 364 Mass. 103, 109 (1973) *cited by Pinckney, supra* at 341, but his conviction was nonetheless vacated almost 20 years later in *Pinckney, supra,* and was thus not precluded under §33E because it raised a new and substantial issue as determined by the SJC gatekeeper (docket SJ-1991-0361).

Error 2: The voluntary manslaughter by provocation charge unconstitutionally shifted the burden on malice to Harris. See 14th Amendment to the U.S. Constitution; Article 12 of the Massachusetts Declaration of Rights; *Mullaney v. Wilbur,* 421 U.S. 684, 704 (1975), made retroactive by *Commonwealth v. Stokes,* 374 Mass. 583, 588, 592 (1978) (state bears the burden of proving absence of provocation beyond a reasonable doubt when the issue is properly presented in a homicide case). Specifically, the charge *repeatedly* instructed that the jury must convict Harris of murder unless they could "find" lack of malice. TVII/1049-1050 (A/75-76). An instruction allowing the jury to find or not to find facts negating malice is erroneous because (1) it implies that there is a burden of proof on that issue on the defendant, and (2) the "finding" language "does not describe precisely what degree of persuasion is required." *Connolly v. Commonwealth*, 377

Mass. 527, 533-534 (1979). Nor does the fact that some parts of the charge were correct require a different result. *Commonwealth v. Beauchamp*, 424 Mass. 682, 689 (1997). Finally, there is no preclusion because the SJC explicitly stated that it did not consider any issues relating to provocation. *Harris*, 376 Mass. at 210 n. 4. Thus, this issue is properly considered under the miscarriage of justice standard, *Commonwealth v. Smith*, 460 Mass. 318, 320-321 (2011), and is certainly non-frivolous.

Error 3: As the Commonwealth concedes (Op. at 5), the charge violated Harris' due process rights with impermissible burden shifting language on the malice element, namely "malice…is implied to every cruel act" at TVII/1022 (A/48). See 14th Amendment of the U. S. Constitution; Article 12 of the MA Declaration of Rights; *Sandstrom v. Montana*, 442 U.S. 510 (1979), made retroactive by *Commonwealth v. Repoza,* 400 Mass. 516, 520 (1987). *Sandstrom* is also retroactive under *Sylvain,* 466 Mass. at 435 for the reasons discussed at A/117-8.

Error was exacerbated with the instruction that malice "not only includes hatred and ill will, but every unjustifiable motive" (TVII/ 1022 (A/48). *See Hill v. Maloney*, 927 F.2d 646, 648-650 (1st Cir. 1990) (granting relief for almost identical language (i.e., malice "is

not confined to ill will" but includes "every other unlawful and unjustifiable motive") which exacerbated the effect of the mandatory presumption ("malice is implied from any deliberate or cruel act against another, however sudden") since such an expansive definition of malice would reinforce the presumption that malice is present). Indeed, this Court affirmed a lower court's order staying execution of sentence where an almost identical error was sufficient for prong 1. *See Commonwealth v. Hodge*, 380 Mass. 851, 856-7 (1980) ("malice is implied from any deliberate or cruel crime against another").

Further, this Court should consider how the three *Christie* prongs should be weighed, particularly for an at-risk elderly prisoner whose release would not endanger public safety. This is the most logical population to be released to slow the spread of COVID-19 in prisons and their nearby communities. This issue is likely to recur given that the DOC imprisons over 1,000 people over the age of 60 who are at high risk of serious illness or death, *CPCS No. 1,* 484 Mass. at 437, and who are at the lowest risk for recidivism, s*ee Doe 151564 v. SORB*, 456 Mass. 612, 621-2 (2010) (age over 61 is an important factor in determining the risk of recidivism and such risk diminishes significantly as an offender ages). While those over the age of 65 account for just 3% of the prison population, they account for

81% of COVID-19 caused deaths in the U.S. population. See https://jamanetwork.com/journals/jama/fullarticle/2768249?appId=scweb (last visited September 15, 2020).

Here, the Appeals Court rightly determined that Harris prevailed on prong 2 for all the reasons discussed by the forensic psychologist. (IE/3-17) As stated above, she determined that he has a "very low" risk of recidivism. *See* 8/21/20 filing. He has strong family support in Massachusetts, and not once did he abscond during almost 30 years on parole. (IE/3-17) Further, he is at high risk of COVID-19 serious illness or death - - and the Appeals Court found that the DOC may very well not be able to keep him alive during the pandemic. He has housing, where he would be able to physically isolate, waiting for him. It is respectfully submitted that meeting the last two prongs of *Christie* should be sufficient to stay his sentence pending appeal under the exceptional circumstances of the global pandemic.

RONNIE M. HARRIS

By his attorney

Dated: September 19, 2020

/s/ Inna Landsman

BBO 640142
451 King St. # 1342
Littleton, MA 01460
617-620-9434
ilandsman@me.com

CERTIFICATE OF COMPLIANCE

I, Inna Landsman, hereby certify that the foregoing application for further appellate review complies with the rules of court that pertain to it, including, but not limited to Mass. R. A. P. 16, 20 & 27.1. I further certify that the foregoing Application for Further Appellate Review complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the proportional font Times New Roman at size 14, and the "Brief Statement Why Further Appellate Review Is Appropriate" section contains 1,924 words as counted using the word count feature of the software program Pages version 10.1 (for Mac OS).

/s/ *Inna Landsman*

CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify that on September 19, 2020, I have made service of this application for further appellate review and the memorandum in support thereof upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the Electronic Filing System

/s/ *Inna Landsman*

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-826

COMMONWEALTH

vs.

RONNIE M. HARRIS.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a jury trial in 1975, the defendant was convicted of murder in the second degree, assault with intent to murder, and unlawful possession of a firearm. In very brief summary, the facts were that the nineteen year old defendant engaged in a street confrontation over drugs and fired a firearm at two people. One he missed; the other he killed. A fuller description of the facts may be found in the decision of the Supreme Judicial Court, which affirmed the defendant's convictions on direct appeal and included plenary review under G. L. c. 278, § 33E.[2] See Commonwealth v. Harris, 376 Mass. 201

[1] Since his indictment, the defendant has legally changed his surname to Salaam.

[2] At the time, convictions of murder in the second degree were entitled to plenary review. See Commonwealth v. Billingslea, 484 Mass. 606, 613 (2020) ("After the 1962 amendment until 1979,

(1978). The defendant was sentenced to life in State prison on his murder conviction,[3] and remained incarcerated until 1989, when he was released on parole. He was returned to prison in 2018 after he was charged with committing an indecent assault and battery on his stepdaughter twenty years earlier,[4] and was sentenced to serve two years. He currently remains incarcerated at the Massachusetts Correctional Institution at Norfolk (MCI-Norfolk).

In August 2019, the defendant filed his first motion pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001), seeking to vacate his convictions and for a new trial. That motion was denied on March 24, 2020, in a detailed memorandum of decision and order. However, because of staffing limitations in the Superior Court clerk's office due to COVID-19, the order was not docketed until April 10, 2020. As a

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a capital case under § 33E was one in which a defendant was tried on an indictment for murder in the first degree and convicted of murder in either the first or second degree"). "In 1979, § 33E was amended to eliminate special review by [the Supreme Judicial Court] of convictions of murder in the second degree based on indictments charging murder in the first degree. St. 1979, c. 346, § 2." Billingslea, supra.

[3] On the conviction of assault with intent to murder, the defendant was sentenced to eight to ten years, concurrent with the murder sentence; the possession conviction was placed on file.

[4] He was also charged with a second incident of indecent assault and battery that allegedly took place in 2006, but was acquitted of that charge.

result, when defense counsel filed an emergency motion to stay based on Mass. R. Crim. P. 31, as appearing in 454 Mass. 1501 (2009), and Christie v. Commonwealth, 484 Mass. 397, 400 (2020), she did not know that the rule 30 motion had already been denied. The Superior Court judge denied the emergency motion to stay based primarily on the fact that she lacked jurisdiction to consider it given that the rule 30 motion had already been decided. The defendant filed a timely notice of appeal on April 10, 2020.

The defendant then filed an emergency motion pursuant to Mass. R. A. P. 6, as appearing in 481 Mass. 1608 (2019), with the single justice of this court, which the single justice denied in a brief order on April 30, 2020. Before us now is the defendant's appeal from the single justice's order.[5] Because the Commonwealth had not filed an opposition to the defendant's emergency motion to stay in the trial court, nor had it filed one with the single justice, we solicited (and received) a response from the Commonwealth. Although not solicited, we also received two further responses from the defendant. After considering the materials that were filed in the trial court, those that were filed with the single justice, and those that have been filed in this appeal, we affirm.

[5] The single justice allowed the defendant's motion to file a late notice of appeal.

"The power to stay a sentence pending appeal 'may be exercised by the sentencing judge, by a single justice of the Appeals Court, or by a single justice of [the Supreme Judicial Court].'" Christie, 484 Mass. at 400, quoting Commonwealth v. Allen, 378 Mass. 489, 496 (1979). "When considering the merits of a motion to stay the execution of a sentence, a judge should consider two factors. First is whether the appeal presents 'an issue which is worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision in the appeal.' [Allen, supra at 498], quoting Commonwealth v. Levin, 7 Mass. App. Ct. 501, 504 (1979). See [Commonwealth v. Cohen (No. 2), 456 Mass. 128, 132 (2010)]. Second, the judge should consider 'the possibility of flight to avoid punishment; potential danger to any other person or to the community; and the likelihood of further criminal acts during the pendency of the appeal.' Commonwealth v. Hodge (No. 1), 380 Mass. 851, 855 (1980)." Christie, supra. "In ordinary times, in considering the second factor, a judge should focus on the danger to other persons and the community arising from the defendant's risk of reoffense. See [Cohen (No. 2), supra; Hodge (No. 1), supra]. In these extraordinary times, a judge deciding whether to grant a stay should consider not only the risk to others if the defendant were to be released and reoffend, but also the health risk to the defendant if the defendant were to

remain in custody. In evaluating this risk, a judge should consider both the general risk associated with preventing COVID-19 transmission and minimizing its spread in correctional institutions to inmates and prison staff and the specific risk to the defendant, in view of his or her age and existing medical conditions, that would heighten the chance of death or serious illness if the defendant were to contract the virus." Christie, supra at 401-402. Whether presented in the trial court, or here, the decision whether to grant a stay is within the sound discretion of the judge or justice. Cohen (No. 2), supra.

The defendant contends that the appeal from the order denying his rule 30 (b) motion raises several issues that offer some reasonable possibility of success on appeal. Specifically, the defendant identifies the following appellate issues. First, he contends that the jury were improperly instructed regarding the Commonwealth's burden of proof because the instructions referred several times to "moral certainty." Second, he contends that the instructions regarding malice were erroneous in various respects and that they shifted the burden of proof. See Sandstorm v. Montana, 442 U.S. 510 (1979). The Commonwealth concedes error to the extent the instructions ran afoul of Sandstrom.

With the exception of his argument based on Sandstrom (which announced a new, retroactive, rule), the defendant's

arguments are subject to the preclusive effect of the Supreme Judicial Court's § 33 plenary review during his direct appeal. See Commonwealth v. Smith, 460 Mass. 318, 320 (2011). The defendant's argument based on Sandstrom is not estopped by the Supreme Judicial Court's plenary review, and we accept the Commonwealth's concession of error with respect to that portion of the instructions. However, in considering whether the issue presents some possibility of a successful decision on appeal from the order denying his rule 30 (b) motion, we have taken into the account the standard of review, as explained in Commonwealth v. Repoza, 400 Mass. 516, 519 (1987), and Francis v. Franklin, 471 U.S. 307, 315 (1985), which requires that the error be placed in context of the instructions as a whole and the theory of defense at trial.

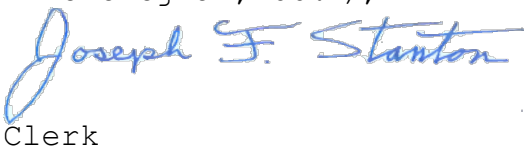
We have carefully considered the materials submitted by the parties, including the materials that were filed below. We have also considered the judge's decision on the rule 30 (b) motion. In addition, we have accepted the defendant's criminal and life history as he has presented it, including his time as a "model" prisoner, and his success during his twenty-nine years of release on parole. We have also accepted that the defendant is sixty-five years old, and that he has various medical conditions that place him at heightened risk of serious illness or death should he contract COVID-19. We have also considered that the

Commonwealth has not been successful at keeping MCI-Norfolk free of COVID-19, nor is there any guarantee that it will be able to do so in the future. We have also taken note that the Commonwealth has not shown that the defendant would present a risk of flight or to others were he to be released pending appeal, nor does the Commonwealth contest his age and medical risk factors. In other words, the second and third factors of Christie weigh in the defendant's favor in considering whether his sentence should be stayed pending appeal.

However, in light of our views on the first factor, we conclude that the single justice did not abuse his discretion in denying the defendant's emergency motion for stay pending appeal and, after exercising our independent review, we reach the same conclusion ourselves.

Order of single justice denying emergency motion to stay sentence affirmed.

By the Court (Vuono, Meade & Wolohojian, JJ.[6]),



Clerk

Entered: August 28, 2020.

[6] The panelists are listed in order of seniority.